IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 5TH JULY 2007 / 14TH ASHADHA 1929

SA.No. 423 of 1994()

(AGAINST THE DECREE DTD.30/01/1993 IN AS.171/1989 of DISTRICT COURT, KOTTAYAM FROM THE DECREE DTD.31/01/1989 IN OS.131/1987 of the MUNSIFF'S COURT, KOTTAYAM)
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APPELLANT: APPELLANT:PLAINTIFF:

M.GEORGE CHERIAN,
DOCTOR,
RESIDNG AT MANALOOR HOUSE,
PARTHAS LANE (KYNADY LANE), KOTTAYAM.

BY ADV. SRI.V.GIRI

RESPONDENTS:RESPONDENTS:DEFENDANTS:
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1. **M.A.JOHN, K.M.C. WARD IX, HOUSE NO.529, KOTTAYAM – 1.**

2. **MRS. ANNI JOHN, W/O.1ST DEFENDANT AGED ABOUT 39, KMC WARD IX ...DO....**

BY ADV. SRI.THAMPAN THOMAS
SRI.K.A.CHERIAN for R1 & R2

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 05/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO.423 OF 1994

Dated 5th July 2007

J U D G M E N T

47 cents in survey No.1715 of Vijayapuram village, Panayakazhippu kara originally belonged to Philipose Kurian. There were several buildings in the property occupied by different tenants. Philipose Kurian sold the property in parts. Under Ext.A1 sale deed, in 1979 appellant purchased item No.1 of plaint schedule property. Under Ext.A2 sale deed, in 1978, S.P.Jain & Company purchased a portion of the property. Under Ext.B5 sale deed in 1980 Haleemabai purchased a portion of the property. Under Ext.B1 second respondent purchased that property. Under Exts.B2 and B3 portions of the properties were also purchased by second respondent. Under Exts.A1 and A2, a right of way and right to use drainage canal was provided for. Contending that it is over item No.2 of plaint schedule property the said right of way and drainage is provided suit was filed seeking a decree for permanent prohibitory injunction contending that

respondents are not entitled to obstruct the same. In the written statement respondents, though admitted the right of appellant to use the way and drainage, contented that item No.2 of plaint schedule property is not said way or drainage canal. Learned Munsiff on the evidence of Pws.1 to 3, Dws.1 and 2, Exts.A1 and A2 and B1 to B5 dismissed the suit holding that identity of the way and drainage provided under Exts.A1 and A2 is not proved as item No.2 of the plaint schedule property. Appellant challenged decree and judgment before District court, Kottayam in A.S.171 of 1989. Learned District Judge on re-appreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

2. Though second appeal was admitted formulating substantial questions of law, on hearing the learned counsel appearing for appellant and respondents, I do not find any substantial question of law involved in the appeal. Ext.A1 provides a right of way as well as right to use the drainage granted, to appellant by the original owner Philipose Kurian. Ext.B5 assignment deed was obtained by Haleemabai subsequently. Second respondent purchased the said right under Ext.B1 only on

25/9/1981. So also rights under Exts.B2 to B4 were obtained in 1982, 1983 and 1984. Therefore, rights transferred under Exts.B1 to B4 could only be subject to the rights available to the appellant, as provided under Ext.A1.

3. But question is whether the rights so provided is over item No.2 of the plaint schedule property. Though Ext.A2 shows that a plan is appended to the sale deed, it was not produced. No commission was also taken out before the court below to fix the identity of the way and drainage. In such circumstances, courts below did not grant the decree sought for. In the facts and circumstances of the case courts cannot grant decree as sought for by the appellant as identity of the way and drainage canal was not proved. Therefore, appeal is without any merit and is dismissed. Dismissal of the appeal will not prevent appellant from instituting a suit for declaration of the right provided under Ext.A1 after identifying the way and drainage as provided in the sale deed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.423 OF 1994

5th JULY 2007

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